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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHILLIP CHAMPION,

No. C 04-0101 CW

Plaintiff,

ORDER GRANTING
DEFENDANT'S
MOTION TO
DISMISS AND
DENYING
PLAINTIFF'S
MOTION FOR
PARTIAL SUMMARY
JUDGMENT

v.

UNITED STATES OF AMERICA,

Defendant.

Defendant United States of America moves, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss for lack of subject matter jurisdiction the complaint filed by Plaintiff Phillip Champion. In the alternative, Defendant moves for summary judgment. Plaintiff opposes the motion and moves for partial summary judgment. The matters were heard on May 27, 2005. Having considered the parties' papers¹, the evidence cited therein and oral argument on the motions, the Court GRANTS Defendant's motion to dismiss for lack of subject matter jurisdiction and DENIES Plaintiff's motion for partial summary judgment.

BACKGROUND

The parties do not dispute that, during the early morning

¹ Defendant's motion to strike Plaintiff's surreply is DENIED.

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1 of June 8, 2001, Plaintiff was injured while riding his off-
2 highway vehicle (OHV) on property known as the Scott's Creek
3 Parcel. The Scott's Creek Parcel was, at the time of
4 Plaintiff's accident, owned by the United States Army Corps of
5 Engineers (COE). It borders the South Cow Mountain OHV
6 Recreation Area, which was, and still is, owned and maintained
7 by the United States Bureau of Land Management (BLM) for the
8 purpose of recreational OHV use. The parties also do not
9 dispute that, at the time of Plaintiff's accident, neither the
10 BLM or COE monitored or maintained any roads or trails for
11 recreational use on the Scott's Creek Parcel. BLM had entered
12 into an agreement with COE in February, 1995 whereby COE agreed
13 to transfer the Scott's Creek Parcel to BLM. That transfer was
14 not completed until March, 2004.

15 Plaintiff was injured when he encountered a large bush that
16 was hanging over Walnut Grove Road, an unmarked trail that runs
17 along Scott's Creek. According to Plaintiff's sworn
18 declaration, just after he maneuvered his OHV under the bush,
19 his OHV fell through a portion of the trail that had been washed
20 away, and Plaintiff and his vehicle fell fifteen feet onto the
21 streambed below. Walnut Grove Road is located on the Scott's
22 Creek Parcel. According to Plaintiff's evidence, prior to his
23 accident, he had been driving his OHV on Mendo-Lake Road, and
24 had turned onto Walnut Grove Road approximately one hundred
25 yards before the accident site.

26 Plaintiff offers evidence that there was no sign warning
27 recreational users of the South Cow Mountain Recreation Area
28

1 that Walnut Grove Road was not part of the BLM-maintained
2 recreation area. Plaintiff submits further evidence that the
3 road washout was caused by improper maintenance of a portion of
4 Mendo-Lake Road that is located on the South Cow Mountain OHV
5 Recreation Area. Conversely, Defendant proffers evidence that
6 Mendo-Lake Road was properly maintained by the BLM, that it did
7 not exhibit signs of erosion or downslope movement, and that it
8 is not located directly uphill from the accident site, so it is
9 unlikely that the washout was caused by downward runoff from
10 Mendo-Lake Road onto Walnut Grove Road. In addition, the
11 Scott's Creek Parcel was not part of the designated route system
12 of the South Cow Mountain OHV Recreation Area; it was marked as
13 "out of bounds" on maps of the area provided by the BLM to OHV
14 users.

15 On January 9, 2004, Plaintiff filed his complaint, which
16 alleges that Defendant willfully and maliciously failed to guard
17 or warn against a dangerous and unsafe condition. The complaint
18 further alleges that the Court has subject matter jurisdiction
19 pursuant to the Federal Tort Claims Act (FTCA). The parties
20 concluded fact discovery on March 18, 2005. On April 22,
21 Defendant filed this motion to dismiss for lack of subject
22 matter jurisdiction or, in the alternative, for summary
23 judgment. On May 6, 2005, Plaintiff opposed the motions and
24 moved for partial summary judgment that Defendant is legally
25 responsible for his injuries. On May 13, Plaintiff filed an
26 amended opposition and summary judgment motion.

LEGAL STANDARD

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1 I. Motion to Dismiss

2 Dismissal is appropriate under Rule 12(b)(1) when the
3 district court lacks subject matter jurisdiction over the claim.
4 Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction
5 must exist at the time the action is commenced. Morongo Band of
6 Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d
7 1376, 1380 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).
8 A Rule 12(b)(1) motion may either attack the sufficiency of the
9 pleadings to establish federal jurisdiction, or allege an actual
10 lack of jurisdiction which exists despite the formal sufficiency
11 of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs.
12 Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers,
13 812 F.2d 1173, 1177 (9th Cir. 1987).

14 Subject matter jurisdiction is a threshold issue which goes
15 to the power of the court to hear the case. Therefore, a Rule
16 12(b)(1) challenge should be decided before other grounds for
17 dismissal, because they will become moot if dismissal is
18 granted. Alvares v. Erickson, 514 F.2d 156, 160 (9th Cir.),
19 cert. denied, 423 U.S. 874 (1975).

20 A federal court is presumed to lack subject matter
21 jurisdiction until the contrary affirmatively appears. Stock
22 West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.
23 1989). An action should not be dismissed for lack of subject
24 matter jurisdiction without giving the plaintiff an opportunity
25 to amend unless it is clear that the jurisdictional deficiency
26 cannot be cured by amendment. May Dep't Store v. Graphic
27 Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980).

II. Motion for Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The

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1 moving party is not required to produce evidence showing the
2 absence of a material fact on such issues, nor must the moving
3 party support its motion with evidence negating the non-moving
4 party's claim. Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497
5 U.S. 871, 885 (1990); Bhan v. NME Hosps., Inc., 929 F.2d 1404,
6 1409 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). If the
7 moving party shows an absence of evidence to support the non-
8 moving party's case, the burden then shifts to the opposing
9 party to produce "specific evidence, through affidavits or
10 admissible discovery material, to show that the dispute exists."
11 Bhan, 929 F.2d at 1409. A complete failure of proof concerning
12 an essential element of the non-moving party's case necessarily
13 renders all other facts immaterial. Celotex, 477 U.S. at 323.

14 Where the moving party bears the burden of proof on an
15 issue at trial, it must, in order to discharge its burden of
16 showing that no genuine issue of material fact remains, make a
17 prima facie showing in support of its position on that issue.
18 See UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471
19 (9th Cir. 1994). That is, the moving party must present
20 evidence that, if uncontested at trial, would entitle it to
21 prevail on that issue. See id.; see also Int'l Shortstop, Inc.
22 v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991). Once
23 it has done so, the non-moving party must set forth specific
24 facts controverting the moving party's prima facie case. See UA
25 Local 343, 48 F.3d at 1471. The non-moving party's "burden of
26 contradicting [the moving party's] evidence is not negligible."
27 Id. This standard does not change merely because resolution of

1 the relevant issue is "highly fact specific." See id.

2 DISCUSSION

3 I. Motion to Dismiss

4 Defendant argues that Plaintiff's claim is barred by the
5 California Recreational Use Statute (CRUS). CRUS states that a
6 private land owner owes no duty of care to keep its property
7 safe for entry or use by others for recreational purposes, and
8 owes no duty to warn of hazardous conditions. Cal. Civ. Code §
9 846. The statute provides for two exceptions: (1) in cases of
10 willful or malicious failure to guard or warn against a
11 dangerous condition, and (2) in cases in which permission was
12 granted by the property owner for recreational use in exchange
13 for consideration. Id. In Morgan v. S. Pac. Transp. Co., 37
14 Cal. App. 3d 1006, 1012 (1974), cited with approval in Rost v.
15 United States, 803 F.2d 448, 451 (9th Cir. 1986), the court
16 established a three-part test for willful misconduct: (1) actual
17 or constructive knowledge of the danger, (2) actual or
18 constructive knowledge that injury is a probable result of the
19 danger, and (3) conscious failure to act to avoid the peril.

20 Defendant notes that there is no evidence of willful or
21 malicious failure, on the part of any COE employee, to guard or
22 warn against the condition that caused Plaintiff's accident.
23 And, Defendant provides evidence that COE was not aware of any
24 dangerous conditions on its property, or of any prior accidents
25 in the Scott's Creek Parcel. Plaintiff argues that, even if
26 CRUS does confer immunity upon COE, BLM is not immune because it
27 was not the owner of the land and it helped to create the

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1 hazardous condition. However, even if BLM were responsible for
2 creating the allegedly dangerous condition on Walnut Grove Road,
3 Plaintiff has submitted no evidence that BLM had actual or
4 constructive knowledge of the fallen bush or the washed out
5 trail, that it had actual or constructive knowledge that injury
6 was probable due to the danger, or that it consciously failed to
7 act to repair the condition. Thus, even if BLM did, as
8 Plaintiff argues, have a legal obligation to maintain the
9 Scott's Creek Parcel due to the land transfer agreement between
10 the BLM and COE, Plaintiff has failed to show that BLM was
11 willful or malicious in failing to guard against the condition
12 that allegedly caused Plaintiff's accident.

13 Plaintiff does not argue that he falls into the second
14 exception of section 846; he does not contend that he exchanged
15 consideration for permission to use the COE land for
16 recreational purposes. And, as Defendant notes, even if
17 Plaintiff did make that argument, Plaintiff would nevertheless
18 not fall under the invitee exception because there was no
19 consideration given in exchange for his use of the COE land.

20 For the foregoing reasons, Plaintiff's claim is barred by
21 the CRUS; thus, his claim must be dismissed because the Court
22 lacks subject matter jurisdiction. Plaintiff's claim is
23 dismissed with prejudice.

24 II. Motion for Summary Judgment

25 Even if the Court did have jurisdiction over Plaintiff's
26 claim, Defendant would be entitled to summary judgment.

27 Defendant moves for summary judgment that, inter alia,

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1 Plaintiff assumed the risk of his injuries because OHV riding is
2 an inherently dangerous activity. The parties do not dispute
3 that a defendant land owner has no duty to protect a plaintiff
4 participating in a sport from risks inherent in the sport
5 itself. See Knight v. Jewett, 3 Cal. 4th 296 (1992). Plaintiff
6 notes that a defendant does owe a duty not to increase
7 unreasonably the risk to a plaintiff above those inherent in the
8 particular sport. Id. at 315. Thus, the critical question here
9 is whether encountering a washed out road or trail is an
10 inherent and assumed risk of riding OHV vehicles.

11 In support of its argument that Plaintiff assumed the risk
12 of his accident, Defendant cites O'Donoghue v. Bear Mountain Ski
13 Resort, 30 Cal. App. 4th 188 (1994). In O'Donoghue, a plaintiff
14 sought damages for injuries suffered when he skied off of a
15 groomed ski run and into a ravine filled with boulders. 30 Cal.
16 App. 4th at 191. The court affirmed the trial court's ruling
17 that granted the defendant summary judgment under the doctrine
18 of primary assumption of risk. Id. at 194. Noting that the
19 plaintiff was an experienced skier, the court ruled as follows:
20 "It is an inherent risk of skiing that a skier might encounter
21 hazardous natural forest obstacles, such as rough terrain,
22 trees, rocks and ravines if he or she enters the natural forest,
23 departing from the ski run." Id. at 193. In his opposition
24 papers, Plaintiff acknowledges that "naturally occurring,
25 unmarked washouts might be an inherent risk of OHV riding," but
26 he nevertheless argues that washouts which are caused by the
27 actions of a landowner are not.

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1 Plaintiff's argument is not persuasive; it is irrelevant
2 whether the government's negligence caused the washed out trail
3 if the risk of encountering that condition is one that is
4 inherent in OHV riding. Id. at 192-93. The facts in this case
5 are fundamentally no different than the facts in O'Donoghue.
6 Plaintiff is an experienced OHV user who, despite his knowledge
7 of the designated trails in the South Cow Mountain OHV
8 Recreation Area, was riding on an unmarked trail outside of the
9 BLM-owned land when he was injured. There is no material
10 dispute that one inherent risk of OHV riding is that a rider may
11 encounter washed out trails and difficult terrain. Plaintiff's
12 accident was the unfortunate realization of that risk.

13 For the foregoing reasons, even if the Court did have
14 jurisdiction over Plaintiff's claim, Defendant would be entitled
15 to summary judgment that Plaintiff assumed the risk of his
16 injuries.

17 CONCLUSION

18 For the foregoing reasons, the Court GRANTS Defendant's
19 motion to dismiss for lack of subject matter jurisdiction
20 (Docket No. 28), DENIES Plaintiff's motion for partial summary
21 judgment, and DENIES Defendant's motion to strike Plaintiff's
22 surreply (Docket No. 58). The Clerk shall enter judgment and
23 close the file.

24 IT IS SO ORDERED.

25
26 Dated: 6/15/05

27 /s/ CLAUDIA WILKEN
28 CLAUDIA WILKEN
United States District Judge

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